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Nos. 85-983 and 85-997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED TRANSPORTATION UNION AND
BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Cross-Petitioners,

v.

INTERSTATE COMMERCE COMMISSION,
UNITED STATES OF AMERICA, DENVER &
RIO GRANDE WESTERN RAILROAD COMPANY,
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
MISSOURI PACIFIC RAILROAD COMPANY, AND
UNION PACIFIC RAILROAD COMPANY,
Cross-Respondents.

Cross-Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF CROSS-RESPONDENT MISSOURI-KANSAS-TEXAS RAILROAD COMPANY IN OPPOSITION TO THE PETITIONS

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The instant cross-petitions are related to petitions for writ of certiorari to the United States Court of

Appeals for the District of Columbia Circuit that were filed on November 7, 1985, by the Interstate Commerce Commission (ICC) and the Missouri-Kansas-Texas Railroad Company (MKT), Nos. 85-792 and 85-793 respectively. Thus, the regulatory agency involved (the ICC) one of the trackage rights tenants whose operations are in issue (MKT), and the two rail brotherhood parties, the United Transportation Union (UTU) and the Brotherhood of Locomotive Engineers (BLE) are in accord that the court of appeals decision warrants the exercise of this Court's supervisory powers. Indeed, the same is true of railroad employers generally and of railroad labor unions generally. (*See*, Brief of the Association of American Railroads and National Railway Labor Conference (AAR/NRLC) *as amici curiae* and UTU Cross-Petition at 16, representing the position of the Railway Labor Executives' Association).

This brief is submitted in opposition to the union cross-petitions, however, because they seek to have the Court review questions which the court of appeals never considered or decided. The practical effect of granting the petitions would be the direct review of the conclusions of the ICC, an improvident exercise of this Court's supervisory authority. Furthermore, even if one were to read this Court's Rule 17, substituting "ICC" for "federal court of appeals", the criteria for granting a writ would still not be satisfied because the cross-petitioners' substantive arguments are flawed. Nothing in the ICC decisions reviewed by the Court of appeals conflicts with applicable decisions of this Court and there is no conflict in the circuits concerning the question presented.

STATEMENT OF THE CASE

Cross-respondent MKT accepts, for the most part, the statement contained in the UTU's cross-petition at pages 3-11. For convenience of reference, we shall also follow the style of the UTU cross-petition in citing to the ICC decisions and the court of appeals decision below by reference to the Appendix to the ICC's petition for certiorari in No. 85-792 (cited as "ICC App.").

Almost all of the UTU's statement treats with matters which the court of appeals decided. To that extent, it is consistent with MKT's own earlier petition and MKT concurs that the resolution of those issues calls for the exercise of this Court's power of supervision.

The UTU statement is inadequate, however, in addressing the question that it seeks to have this Court resolve: the contention that 49 U.S.C. § 11347 constitutes an absolute bar to ICC authorization of parties to an approved trackage rights transaction to specify the crews to be used, irrespective of the facts of the case or whatever findings the ICC may make concerning the necessity for a manning provision to effectuate the purposes of the underlying transaction found to be required by the public interest.

That issue was never decided by the court of appeals. Indeed, as we shall demonstrate, it is not even the one that the court of appeals declined to decide. The principal error in the UTU's statement, however, is its assertion that the court of appeals "did not address the issue because it *initially* vacated the ICC's decisions 'in their entirety' *without a re-*

mand." (Cross-Petition at 11, emphasis added). That contention is simply fallacious. To be sure, the court of appeals did "initially" vacate the ICC's orders "without a remand." And, to be sure, the court of appeals declined to decide *some* issue. But the suggestion that the court of appeals neglected to correct or reconsider the declined issue when it *sua sponte* amended its decision to provide for a remand is belied by the care the court exercised in carefully amending the opinion to reflect its changed position. (Compare ICC App. at 3a, 21a, 28a, 30a, 40a-41a with ICC App. at 45a-47a.).

SUMMARY OF ARGUMENT

The UTU makes two arguments. First, it contends that the ICC's consistent policy prior to the Staggers Rail Act of 1980 (Pub. L. No. 96-448, 94 Stat. 1895) was to reject contentions that the section 11341(a) exemption power extended to Railway Labor Act (RLA) rights, but that, since the Staggers Act, the ICC had reversed its field. (UTU Cross-Petition at 11-16). That is manifestly incorrect. The ICC's interpretation of 49 U.S.C. § 11341(a), and its predecessor, section 5(11) of the Interstate Commerce Act, has been consistently followed for decades.

The UTU's second argument is that "the ICC [not the court of appeals] has decided an important question in a manner which conflicts with applicable decisions of this Court." (UTU Cross-Petition at 17). The applicable decisions are alleged to be *Watt v. Alaska,* 451 U.S. 259 (1981) and *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156 (1962). *Watt* and *Burlington,* however, given the most favorable reading from the UTU's point of view, stand at most

for the proposition that potentially conflicting statutes are to be read so as to harmonize their legislative purposes. That is precisely what the Commission has done here. It is the interpretation contended for by the UTU—that the Railway Labor Act is paramount under all circumstances—which does violence to the *Watt* and *Burlington* principles.

The BLE joins the UTU's first argument (BLE Cross-Petition at 10-16). In addition, however, it contends that the decision below conflicts with the decisions of this Court in *Detroit & T. S. L. R.R. Co. v. Brotherhood of Locomotive Firemen and Enginemen*, 396 U.S. 142 (1969) and *Order of R.R. Telegraphers v. Chicago & N.W. Ry. Co.*, 362 U.S. 330 (1960). (BLE Petition at 16-19). No such conflict exists. The *Shore Line* case, as cited by BLE, is a simple exegesis of the operations and the purpose of the Railway Labor Act's negotiation and mediation provisions. The *Telegraphers* case did not involve 49 U.S.C. § 11341(a)—or, indeed, *any* exercise of Interstate Commerce Commission powers under the Interstate Commerce Act.

Finally,[1] BLE suggests a division in the circuits, contrasting the decision below with *St. Louis S.W. Ry. Co. v. Brotherhood of R.R. Signalmen*, 665 F.2d 987 (10th Cir. 1981), *cert. denied*, 456 U.S. 945 (1982) and *Texas & N. O. R.R. Co. v. Brotherhood of R.R. Trainmen*, 307 F.2d 151 (5th Cir. 1962). The *St. Louis Southwestern* case is inapposite; it dealt with a carrier attempt to alter an agreement reached with the unions

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[1]Our reference is to BLE's final point in support of its petition (Point 1-C of its argument). Its physically final argument (Point II of its petition) calls for issuance of the writs prayed for by the ICC and MKT.

after the consummation of the transaction. The *Texas & New Orleans* decision, while favorable to the union in ultimate result, acknowledged that, where the RLA conflicted with public interest findings under the Interstate Commerce Act, the RLA must give way.

ARGUMENT

I. There Has Been No Abrupt And Unexplained Change In The ICC's Interpretation Or Application Of 49 U.S.C. §§ 11341(a) And 11347

BLE and UTU, although from somewhat different perspectives, contend that the ICC effected a sudden reversal of field in the administrative proceedings of which review is sought here. They contend that ICC decisions prior to the enactment of the Staggers Act unequivocally established the paramountcy of the RLA (and agreements entered thereunder) over the ICC's exercise of its plenary and exclusive jurisdiction under section 11341(a), including its exemption authority, citing *Southern Ry.-Control-Central of Ga. Ry.*, 331 I.C.C. 151 (1967);[2] *Chicago, St. P., M. & O. Ry. Lease*, 295 I.C.C. 696 (1958);[3] *Leavens v. Burlington N.*, 348 I.C.C. 962 (1977)[4] and *Brotherhood of Locomotive Eng'rs v. Chicago & N.W. Transp. Co.*, 366 I.C.C. 859 (1983).[5]

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[2]UTU Cross-Petition at 13-14 and BLE Cross-Petition at 13-14.

[3]UTU Cross-Petition at 14.

[4]BLE Cross-Petition at 15.

[5]BLE Cross-Petition at 15-16. This case was decided *after*, not before, the *UP-MP Merger Case*.

The BLE prefaces its discussion of this issue by invoking *Chevron*[6] (BLE Cross-Petition at 10-11). We entirely concur with that preface. *Chevron* summarized the proper standard of review of an agency's interpretation of its governing statute:

> When a court reviews an agency's construction of the Statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 2781-2782 (footnote omitted).

The Commission's interpretation of 49 U.S.C. § 11341(a), has been followed consistently for decades. *See, e.g. Texas Turnpike Auth.-Abandonment-St. L. S.W. Ry. Co. of Tex.*, 328 I.C.C. 42, 46 (1965); *Ex*

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[6]*Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 104 S.Ct. 2778 (1984).

Parte No. 260, Revised Regulations Governing Officers, 336 I.C.C. 679, 682 (1970); *Railway Express Agency, Inc., Notes,* 348 I.C.C. 157, 215 (1975). That interpretation is fully supported by the previous interpretations of the statute rendered by this Court[7] and with the statute's legislative history.[8] An interpretation which could require MKT to bargain with MP's employees and face potential disruptions of service in its efforts to perform rail service required by the public interest is simply inconceivable.

The ICC decisions cited by the rail brotherhood cross-petitioners are entirely consistent with this view. The *Chicago, St. Paul* case dealt with a lease by the Chicago and North Western Railway Company (CNW) of certain lines and incidental property owned, used or operated by the Chicago, St. Paul, Minneapolis and Omaha Railway Company (Omaha).[9] The then-extant labor protective conditions were imposed upon the original order of approval. 295 I.C.C. at 696.[10] Following consummation,[11] the CNW sought the imposition of a *new* condition that would preempt

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[7]*See Schwabacher* v. *United States,* 344 U.S. 182, 194 (1948).

[8]The legislative history is exhaustively detailed in *Brotherhood of Locomotive Eng'rs* v. *Chicago and N.W. Ry. Co.,* 314 F.2d 424, 430-32 (8th Cir.), *cert. denied,* 375 U.S. 819 (1963).

[9]The underlying transaction had been approved in *Chicago, St. P. M. & O. Ry. Co. Lease,* 295 I.C.C. 441 (1956).

[10]Those conditions were known as the *Oklahoma* conditions (1944) *Oklahoma Ry. Co. Trustees Abandonment,* 257 I.C.C. 177 and did *not* provide for the compulsary arbitration of implementing agreements, but only for arbitration of claims for cash compensation for aggrieved employees.

[11]Consummation occurred on January 1, 1957; the CNW petition was filed on July 5, 1957. 295 I.C.C., 696-97.

subsequent negotiations conducted under the RLA. Naturally, the Commission refused. But section 5(11)—the predecessor of section 11341(a)—was *not* involved. If it had been, the request for a *new* condition would have been entirely unnecessary. As the ICC noted, the only reason that CNW was obliged to confer with the labor organizations in the first instance was "[i]n the absence of the prescription by us of specific procedures . . ." 295 I.C.C. at 697. The ICC clearly viewed itself as having the power to override section 6 of the RLA; it simply chose not to do so under the circumstances of the case.[12]

Indeed, the CNW petition expressly conceded that the ICC's original order of approval did not confer a section 5(11) exemption, but sought to have ICC exercise its authority to grant such an exemption after the fact. 295 I.C.C. at 699-70. The Commission, in the exercise of its discretion, declined to do so, but it never suggested that it *could* not do so.[13] Mcreover,

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[12]Moreover, the ICC noted that many of the operational changes proposed by the CNW "are far removed from the [lines of the] Omaha and would not seem necessarily related to accomplishment of the unification between Northwestern and Omaha." 295 I.C.C. at 697.

[13]The ICC did suggest, in commenting on *Kent* v. *CAB*, 204 F.2d 263 (2d Cir.), *cert. denied*, 346 U.S. 826 (1953), that *Kent* related only to obligations imposed on the *carrier*, and not the unions representing employees of the carrier. As the Second Circuit subsequently made clear in expanding on *Kent*, that was a distinction without a difference. The CAB (and the ICC) can also bind the labor organizations involved. *American Airlines* v. *CAB*, 445 F.2d 891 (2d Cir. 1971), *cert. denied*, 404 U.S. 1015 (1972).

in reaching its decision, it articulated *exactly* the same interpretation of the exemption section as it did below:

> We find nothing in that paragraph [section 5(11), the predecessor of section 11341(a)], or in the other portions of section 5, which authorizes us to determine and declare the *particular* laws within the scope of paragraph (11) from which a carrier shall be relieved. The terms of this paragraph are *self-executing,* and there is no need for this Commission expressly to order or declare that a carrier be relieved from certain restraints. It is sufficient if we make clear what the carrier is authorized to do.

295 I.C.C. at 702 (Emphasis added).

Finally, the Commission made the obvious point that since the transaction had already been consummated, "[i]t is apparent that the Railway Labor Act has not prevented the North Western from effectuating the transaction authorized by the prior order." *Id.*

The *Southern-Central* case must be read in light of the immediately prior discussion because the ICC relied on the conclusions we have just summarized. That case arose on remand from this Court as a consequence of *Railway Labor Ass'n v. United States,* 379 U.S. 199 (1964), in which the Court concluded that ICC could not cast aside provisions of the Washington Job Protection Agreement (WJPA) with no explanation. Recognizing the primacy of section 5(11), the Association position on remand was that the RLA and existing agreements remain in force "in the absence of lawful reasons requiring *modification* or outright

nullification." 331 I.C.C. at 152-53 (emphasis added). The *Oklahoma* conditions were no longer imposed[14] and section 5 of the WJPA provided that if an implementation agreement could not be negotiated, *compulsory* arbitration was available. 331 I.C.C. at 156. Thus, the RLA section 6 procedures were already overridden. Section 5 of the WJPA preempted the normal consequences of section 6 of the RLA, 331 I.C.C. at 165. That is no less true when the substance of section 5 is imposed as a labor protective condition. The language quoted by BLE and UTU in their cross-petitions was addressed to the claim of the Southern Railway that it was exempt from all laws and contracts, even those whose application would *not* frustrate the approved transaction. 331 I.C.C. at 166-171. Indeed, in the complained of actions, the Southern ignored both the imposed conditions and the WJPA, 331 I.C.C. at 171-173.

The BLE's invocation of *Leavens* is totally inapposite. The Commission, in the passage BLE quotes, was neither shrinking from its authority to define and impose labor protective conditions nor renouncing its exclusive and plenary power to approve transactions and exempt them from all laws, including the labor laws. The ICC did disclaim any desire to set itself up as a labor court to adjudicate every grievance arising from a claimed violation of a labor protective provision or of a collective bargaining agreement. 348 I.C.C. at 975-977.

Finally, in *BLE* (which was decided three months *after* the granting of the MKT's trackage rights application), the BLE's complaint against CNW opera-

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[14]*See* discussion at 331 I.C.C. 159-166.

tions over the lines of the Indiana Harbor Belt Railroad Company (IHB) was dismissed. There CNW operated over IHB lines, displacing IHB locomotive engineers, pursuant to an ICC-approved trackage rights agreement. BLE, interestingly enough, did not suggest any impropriety in that operation *if* the trackage rights agreement had been lawfully consummated. Its contention was that CNW's authority had lapsed through non-exercise and that there was therefore no approved transaction to which an exemption could attach. We suggest that BLE's posture in that case constitutes an acknowledgement that MKT's operations here are beyond challenge. The language quoted by BLE involved a second aspect to its complaint—a request that ICC serve as the forum for litigating BLE's protective condition claim against IHB. (The analogy to the instant case would be a request that ICC try out a BLE claim against MP for compensation for MP engineers allegedly displaced by the MKT trackage rights operation.). As in *Leavens,* ICC remitted the union to its arbitral remedies, refusing to become a labor court.

II. The Issue Of Which Review Is Sought, If Decided At All By The Court Of Appeals, Was Not Decided Inconsistently With Prior Decisions Of This Court

The UTU asserts as error the ICC's disregard of the teachings of *Watt* and *Burlington* by its alleged failure to construe the Interstate Commerce Act (specifically sections 11341(a) and 11343) and the Railway Labor Act (specifically section 6) so as to accommodate the policies of the two acts. (UTU Cross-Petition at 19-20). This question is not even the one the court of appeals declined to reach (or the one, in BLE's view, which it tacitly decided). The issue which the

rail brotherhoods argued to the court of appeals—and which the court below avoided—was whether there was a conflict between two separate provisions of the Interstate Commerce Act, *to wit*, sections 11341(a) and section 11347. (*See* ICC App. at 20a-21a).

Furthermore, the position advanced by UTU does not contemplate an accommodation of the purposes of section 11341(a) and 11343 with those of either section 11347 or section 6 of the RLA. The UTU's claim for relief requires a conclusion that these labor provisions are completely paramount and override and preempt any conditions imposed in the public interest under section 11343, as well as the ICC's plenary exemption power under section 11341(a).

The principles of decision in *Watt*—that facially conflicting statutes should be read so as to effectuate the legislative purposes of each insofar as possible and that repealers by implication are to be shunned—are longstanding rules of statutory construction imbedded in this Court's jurisprudence long before 1981. Nothing in the ICC decision aggrieving the cross-petitioners is inconsistent with these axioms of interpretation. On the contrary, the ICC complied with them in two separate portions of its decision on reconsideration.

In the first place, ICC "conclude[d] that the trackage rights agreements do not involve a change in UP-MP employees' working conditions in a manner contrary to RLA requirements . . ." (ICC App. at 59a). Thus, there was no conflict with the RLA to be reconciled. The ICC acknowledged that it was obliged

to "consider the policies of statutes other than the Interstate Commerce Act to the extent those policies are relevant to the determination of whether a proposal is consistent with the public interest." (ICC App. at 60-61a). But it found no clash between the policies of the RLA and the Interstate Commerce Act:

> The record in these proceedings is devoid of any suggestion by BLE, UTU, or any other party that the approval of the responsive trackage rights applications, subject to the usual labor protective conditions, would be in any way inconsistent with the policies of the RLA. In these circumstances, we can find no merit in UTU's argument that we improperly failed to reconcile the policies of the RLA with our decision.

(ICC App. at 61a).

Secondly, assuming *arguendo* that a conflict did exist, the ICC concluded that the statutes could be harmonized by confering an exemption from the RLA under the limited circumstances contained in section 11341(a). It cited, and adopted, the extensive discussion analyzing the legislative history of the underlying provisions, including their accommodation with the RLA, that was set forth in *Brotherhood of Locomotive Eng'rs v. Chicago & N.W. Ry. Co.*, 314 F.2d 424, 432 (8th Cir.), *cert. denied*, 375 U.S. 819 (1983), (*BLE v. CNW*) (ICC App. at 59a-61a). Interestingly enough *BLE v. CNW* is cited in neither union cross-petition.

As the ICC said:

> If our approval of a transaction did not include authority for the railroads to make nec-

> essary changes in working conditions, subject to payment of specified benefits, our jurisdiction to approve transactions requiring changes of the working conditions of any employees would be substantially nullified. Such a result would be clearly contrary to Congressional intent. [Citing *BLE v. CNW's* extensive discussion of the legislative history and the Harrington Amendment.]

(ICC App. at 60a).

Consequently, the ICC has more than satisfied the teaching expressed in *Watt, Burlington* and similar cases.

Cross-petitioner BLE lodges a more direct challenge. It contends that the *Shore Line* and *Telegraphers* cases raise an absolute bar—however an ICC decision may be rationalized or reconciled—to any interruption of the RLA section 6 process by the exercise of the ICC's section 11341(a) exemption power. The *Shore Line* case is totally inapposite. While its conclusions as to the meaning of the *status quo* provisions of the RLA are unassailable, the case dealt with a unilateral employer change in working conditions. Under either of the ICC's alternative theories of decision, such a unilateral interruption of the *status quo* is not at issue here. As the Commission noted, no violation of the *status quo* provisions was established. And even if the *status quo* was in some degree altered, it was only to the extent necessary to effectuate the transaction found required by the public interest. The carriers were, therefore, *pro tanto* exempted from the RLA.

The *Telegraphers* case is only superficially more in point. The regulatory actions purportedly giving rise

to the dispute were actions of *state* agencies, which lacked the power to exempt parties before them from "all other law." Thus, the Commission's exemption powers were not implicated and there were no arguably conflicting statutes to reconcile.[15]

Moreover, the Court clearly implied that the regulatory applications were incidental. 362 U.S. at 338-342. See especially footnote 16:

> Moreover, this railroad operates in nine States; it has instituted proceedings in the state regulatory commissions of four only and at the time of the District Court's decision, only two of these had rendered a decision. Yet, the union's proposal was to negotiate for a clause which would apply to respondent's entire system. The railroad's refusal to bargain was not limited, however, to operations in the four States in which proceedings had begun. And even assuming that the order of one State, South Dakota, was mandatory and that this fact is of importance, it would not relieve the railroad from any duty it had to bargain on the proposed contract change in the eight other States involved.

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[15]As the Court said:

> Nothing the unions requested would require the railroad to violate any valid law or the valid order of any public agency.
>
> 362 U.S. at 340.
>
> Here the unions would compel the Missouri-Pacific to violate the trackage rights agreement the ICC found *required* to cure the otherwise impermissibly anticompetitive effects of the consolidation.

362 U.S. at 340, n. 16.

None of the arguments advanced by the cross-petitioners establish any inconsistency of the decisions of the ICC and/or the court of appeals with any decision of this Court.

III. There Is No Conflict In The Circuits Concerning The Issue BLE Seeks To Place Before This Court

The only conflict in the circuits pertinent to this case involves the issue of which petitioners ICC and MKT seek review. (See MKT petition at 13-15 and AAR/NRLC *amici* brief at 12-16). The BLE's attempt to create a conflict with the *St. Louis-Southwestern* and *Texas & New Orleans* cases falls short of the mark. Those decisions are simply not at war with the court of appeals decision. Only the *Texas & New Orleans* case is tangentially relevant, but the arguably similar aspect of *Texas & New Orleans* accords with the court of appeals treatment of the comparable issue below.

St. Louis, Southwestern is a singularly inappropriate authority. That case turned exclusively on the question of whether the underlying controversy was a major dispute or a minor dispute under the RLA. The ultimate decision was an interesting addition to RLA major/minor dispute learning, but it had nothing to do with the displacement of the RLA. BLE argues that the decision resolves the issue of the primacy of the RLA over the Bankruptcy Act (inasmuch as the lines affected were lines acquired from the bankrupt Chicago, Rock Island and Pacific Railroad). If the decision had done so, it would be of only marginal utility in evaluating the outcome of a clash between

section 11341(a) and the RLA. But the decision did not do so; it is utterly silent on any such clash of statutes—and the rail brotherhood appellant never raised such a claim. 665 F.2d at 989. Indeed, the carrier had previously entered a specific written agreement providing that the underlying work assignment issues were to be resolved by the section 6 negotiation processes. 665 F.2d at 993.

In *Texas & New Orleans*, the issue was whether the anti-injunction provision of the Norris-LaGuardia Act was displaced by section 5(11) of the Interstate Commerce Act. But the Court decided the case by deciding that there was no clash, not that the Norris-LaGuardia was paramount. The facts were that the operational changes in issue were proposed and agreements negotiated long before ICC jurisdiction was ever invoked. Indeed, the railroads, recognizing the applicability of the RLA, actually served section 6 notices on the Brotherhood of Railway Trainmen in May of 1960. National Mediation Board jurisdiction over this concededly major dispute attached in June 1960 and the dispute entered mediation. Only four months later was an application filed with the ICC—an application seeking authority to abandon certain track only tangentially implicated in the then-existing labor dispute, which was still in mediation.

More importantly, the Court gave full force to section 5(11). Even doing so, it found that section 5(11) had no bearing on the Norris-LaGuardia question: Norris-LaGuardia constituted a jurisdictional limit on the United States District Courts. The carrier sought to find substitute *jurisdiction* in section 5(11). The Court said:

> This section [5(11)] relieves the carriers of the restraints and limitations of other laws, but it does not, on its face, relieve them from the action of other parties, i.e. the union's economic threat of a strike. Further, Norris-LaGuardia could not be considered as a legal restraint or limitation on the carriers and their ability to carry out an approved transaction. It is directed not at the power of the carriers to do anything but the power of the court to grant injunctive relief. Thus section 5(11) does not, by express terms, grant the jurisdiction which Norris-LaGuardia withdrew.

307 F.2d at 156.

We have reservations about the correctness of that decision, but correct or not, it is not pertinent here.[16] Section 5(11) was given full force in *Texas & New Orleans;* here, its successor is sought to be straightjacketed.

And most importantly, the court of appeals held that if there *was* a clash between the labor laws and section 5(11), section 5(11) would reign supreme:

> If it should be determined that the Commission's authority under section 5 is being frustrated by application of Norris-LaGuardia to the present suit, *we would have to conclude that Norris-LaGuardia was preempted by sec-*

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[16]It may be pertinent to the UTU's petition for a pre-judgment writ of certiorari to the eighth circuit court of appeals, seeking review of the district court's enjoining a UTU strike of the MP over the trackage rights issue.

tion 5(11), even though section 5 is not labor legislation.

307 F.2d at 158 (emphasis added).

CONCLUSION

The cross-petitions for a writ of certiorari should be denied.

Respectfully submitted,

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